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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-71

PRESSLEY L. HILLIARD; ESTATE OF CARL HILLIARD by LUELLA HILLIARD, Executrix; RUTH R. BOOKSER and EDWARD F. BOOKSER, husband and wife,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA, Acting by and through the PENNSYLVANIA GAME COMMISSION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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Questions Presented

1. Does this case have such a broad public interest that this Court should assume jurisdiction?

2. Can the state courts impose reasonable procedural time limits on the assertion of federal constitutional rights?

3. Does the Pennsylvania Eminent Domain Code provide reasonable methods for litigants to assert their federal constitutional rights?

ARGUMENT

A review on certiorari not being a matter of right, but of sound judicial discretion, it is submitted that in this case there is no such important or overriding considerations as to justify this Court in granting the Petition. As of now, there have been eight decisions by various courts, in this case, and no court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The chief thrust of this Petition for Writ of Certiorari is to the effect that petitioners filed Preliminary Objections to the original Declaration of Taking, pursuant to Section 406 (26 P. S. 1-406) of the Pennsylvania Eminent Domain Code, which were constitutional in nature, and that these are undisposed of, and that when petitioners attempted to again raise these same constitutional objections, by way of Objections to the Amended Declaration of Taking, they were unconstitutionally barred. From this decision of the Court of Common Pleas of Butler County they took an appeal to the Pennsylvania Supreme Court, which affirmed. From this decision no Petition for Writ of Certiorari to this Court was filed. Subsequently, petitioners petitioned the Court of Common Pleas to take testimony on the power and right of the state to condemn, allegedly pursuant to Sections 515 and 517 of the Pennsylvania Eminent Domain Code, which Petition was dismissed by the Court. An appeal was taken to Commonwealth Court, which affirmed, and Petition to Pennsylvania Supreme Court for appeal, which was denied. From this denial petitioners have now filed this Petition for Writ of Certiorari to this Court.

It is to be noted that the Pennsylvania Statute does provide methods whereby litigants may assert their federal constitutional rights. These are set forth in Section 406 of the Eminent Domain Code, and provide that the same must be taken by Preliminary Objections, within thirty days. It is to be noted that the thirty day period is the same as provided for in the Federal Rules of Procedure, Rule 71-A (e).

This Court has consistently held that the states may provide procedural rules whereby federal constitutional questions may be asserted, or they will be waived. As stated in *Central Union Telephone Company vs. City of Edwardsville*, 269 U. S. 190, at Page 194-195, 46 Sup. Ct. 90:

> "But there is nothing in these cases which justifies this Court in ignoring or setting aside a required form of practice under the Appellate Statutes of the state by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the state or be held to be waived, if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court."

To the same effect is *Michel vs. State of Louisiana*, 350 U. S. 91, at Page 97, 76 Sup. Ct. 158:

> "It is beyond question that under the Due Process Clause of the Fourteenth Amendment Lousiana may attach reasonable time limitations to the assertion of federal constitutional rights."

This Court quoted with approval, in *Beck vs. Washington*, 369 U. S. 541, at Page 550, 82 Sup. Ct. 955 (1962), the following procedure:

> "The Washington Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in a trial court, even where the constitutional claims arise from the trial court's interpretation of the challenged statute."

In *Wolfe vs. State of North Carolina,* 364 U. S. 177, at Page 195, 80 Sup. Ct. 1482 (1960), this Court said:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law. (Citing cases)."

Section 406 of the Pennsylvania Eminent Domain Code provides procedure whereby condemnees may contest the constitutionality of any taking, and raise any state or federal constitutional issues. Petitioners now claim they were denied this right, by the lower courts' decisions, and the decision of the Pennsylvania Supreme Court. From that decision, however, no Petition for Writ of Certiorari to this Court was taken. Hence, that decision must stand, and this Court accepts the decision of the state court, whether right or wrong. *Wolfe vs. State of North Carolina, Supra,* at Page 195. If petitioners desired to pursue their contention that they were unconstitutionally denied the right to contest the constitutionality of the taking, they should have pursued the decision of the Pennsylvania Supreme Court, filed January 15, 1969, reported at 433 Pa. 599; 249 A2d. 536, to this Court by Petition for Writ of Certiorari, at that time.

Petitioners, instead, elected to go to the Federal District Court for the Western District of Pennsylvania, in a Petition for an Injunction. This was denied, Judge Gourley, reported in 308 Fed. Supp. 756, and on appeal to the Third Circuit Court of Appeals, affirmed, on different grounds. 438 Fed. 2d 92.

Petitioners then sought to pervert the Pennsylvania Eminent Domain Code, Section 515 and Section 517, by attempting to read these sections into allowing the raising of constitutional issues once again. Clearly, this is a misapplication of the statute. Section 406 (26 P. S. 1-406) provides an adequate method, and the exclusive method, of challenging the power or right of the condemnor to appropriate the condemned property. This is in the initial stages. Once the Board of View is appointed and enters an award of damages, from which an appeal has been taken, Sections 515 and 517 (26 P. S. 1-515 and 26 P. S. 1-517), become applicable, and provide that all objections, other than to the amount of the award, *raised by the appeal*, shall be determined by the court preliminarily. It is clearly evident that at this stage of the proceedings, the time for constitutional attacks, or attacks on the power and right of the condemnor to proceed, have long since passed. The Board of View has no power to hear attacks on constitutionality. The Board of View has only power to hear testimony and set an award. An appeal lies, but the appeal therefrom cannot raise constitutional issues. Section 517 therefore applies to objections, or other issues of law, that will come up in the trial of the case, but not constitutional issues, which cannot come up in the trial of the case, since they must have been determined preliminarily by the Court under Section 406. Buttressing this conclusion is the holding of the Pennsylvania Supreme Court in *Hannai Appeal*, 420 Pa. 289, 216 A2d. 774 (1966), which held that an appeal would lie to the Pennsylvania Supreme Court from a decision of the lower court, dismissing Preliminary Objections. It was pursuant to this holding that petitioners took their first appeal to the Pennsylvania Supreme Court, expressly attacking the decision of the lower court dismissing their Preliminary Objections.

Since *Hannai Appeal, Supra*, provides for an appeal to the Pennsylvania Supreme Court on the issues of constitutionality, prior to the trial of the case on the issues of damages, Sections 515 and 517 of the Eminent Domain Code can in no manner be stretched to include issues of constitutionality.

Since this Petition for Writ of Certiorari deals with Sections 515 and 517, being the sections last appealed to the Pennsylvania Supreme Court, and these sections clearly having no relation to any federal issues, and not even any pretext at controlling federal rights to contest constitutionality of a take, this Court should not assume jurisdiction to review the case, as there is no federal question involved. This attempted relitigation of the original decision handed down by the Pennsylvania Supreme Court on January 15, 1969, by later litigation, has been condemned in *Warriner vs. Fink*, 307 F.2d. 933, at 936 (1962):

> "We are convinced, however, that when the plaintiff failed to seek review by the Supreme Court of the United States of the judgment of the Supreme Court of Florida, of January 23, 1952, dismissing her appeal, she lost the only avenue of relief available to her in the federal courts."

The Pennsylvania Eminent Domain Code fully protects all condemnees rights to assert any federal or state constitutional issues. This Court has stated that the Pennsylvania Eminent Domain Code provided a full and complete remedy to all land owners, whose land is taken by the state. *Martin vs. Creasy*, 360 U. S. 219, 79 Sup. Ct. 1034 (1959). There, at Page 223, this Court said:

> "It was the clear pronouncement of the Pennsylvania Courts that the state statute provides a complete procedure to guard and protect the plaintiff's constitutional rights 'at all times.'...It must be assumed

that the courts of Pennsylvania meant what they said in stating that the plaintiffs will be afforded a procedure through which the full measure of their rights under the United States Constitution will be preserved..."

The Pennsylvania Code has been amended since 1959, but the amended Code still provides land owners with all rights and remedies to contest constitutionality of the take. Since the date of the adoption of the new Code, the Third Circuit Court of Appeals, in *Hohensee vs. State of Pennsylvania,* 383 F.2d. 784 (1967), has cited and affirmed the *Martin* case, *Supra.*

Summary

This Court should not assume jurisdiction to review the decision of the Pennsylvania Supreme Court, for the reasons that there is no broad public interest involved, nor have any state courts departed from the accepted and usual course of judicial proceedings; further, this Petition is to the decision of the Pennsylvania Supreme Court construing state law only, and no federal questions whatsoever are involved; further, this Court has consistently held that the states may provide time limits and procedures whereby federal questions may be raised, and if not so raised by such times and through such procedures, they are waived.

Respectfully submitted,

ROBERT J. STOCK,
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